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No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

JOSEPH SAVINO, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in a federal firearms prosecution under 18 U.S.C. § 922(a)(3), and 26 U.S.C. § 5861(d) for possession of a firearm, the court below improperly extended the legal fiction of constructive possession to sustain a conviction based on an undercover "sting" operation directed by the government at the petitioner, a former New York City Councilman, where, despite alleged coded negotiations between the petitioner and the undercover agent, the evidence at trial was uncontradicted that (i) at the time the government agent attempted to transfer the firearms to the petitioner, the petitioner categorically refused to take the firearms from the agent and denied any possessory interest in the firearms, and (ii) the undercover agent at all times maintained control over the firearms, did not transfer the firearms to the petitioner and did not transfer to the petitioner the means of controlling the firearms.

2. Whether the court's examples of constructive possession were misleading and prejudicial, thereby depriving the petitioner of a fair trial in violation of the Fifth Amendment of the Constitution.

3. Whether the petitioner was entitled to submit the issue of entrapment to the jury as an alternative defense, where an informer turned government undercover agent devised "a sting operation" designed to transfer illegal firearms to the petitioner who had no prior criminal record.

4. Whether the elements of 18 U.S.C. § 922(a)(3) are satisfied if the petitioner received firearms in his home state from the informer who obtained the firearms in petitioner's home state, where a government agent, unknown to the petitioner, had obtained the firearms from government offices out of the state.

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OPINION BELOW

The memorandum opinion of the Court of Appeals in *United States v. Savino, Jr.*, No. 86-1004, (2d Cir. March 27, 1986) is not reported and appears in the appendix, *infra* (1a-3a).

JURISDICTION

The judgment of the Court of Appeals was entered on March

27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

Title 26 U.S.C. § 5861(d) provides:

> It shall be unlawful for any person —
>
> * * *
>
> (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record;. . . .

Title 18 U.S.C. § 922(a)(3) provides:

> (a) It shall be unlawful —
>
> * * *
>
> (3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides . . . any firearm purchased or otherwise obtained by such person outside that State. . . .

The Fifth Amendment to the Constitition provides in pertinent part:

> No person shall . . . be deprived of life, liberty or property, without due process of law . . . .

STATEMENT OF THE CASE

Shortly after midnight in the early morning hours of April 4, 1985, the petitioner Savino was arrested without a warrant by agents of the Bureau of Alcohol, Tobacco and Firearms outside of a neighborhood restaurant in the Bronx. By a succession of superseding indictments, the petitioner was ultimately tried on a four count indictment, which charged him with possession of firearms and silencers not registered to him in the National Firearms Registration and Transfer Record, under 26 U.S.C. §5861(d), and receiving weapons in New York, which were allegedly obtained by Savino outside of New York in violation of 18 U.S.C. § 922(a)(3).

Savino's arrest was the culmination of an undercover "sting" operation initiated by ATF in March and April of 1985 designed to induce Savino to take possession of illegal weapons supplied by a past business associate, turned government informant and undercover agent, Blevins.

Savino pleaded not guilty to the charges, maintains his innocence and asserts that he never intended to, and never did take possession of the firearms the government attempted to foist on him through their undercover agent, Blevins.

Savino pleaded not guilty to the charges, maintains his innocence and asserts that he never intended to, and never did take possession of the firearms the government attempted to foist on him through their undercover agent, Blevins. The uncontradicted evidence below establishes that Savino expressly refused to accept the transfer of the firearms from Blevins, and Blevins always maintained control of the firearms. Nevertheless, the petitioner was convicted after lengthy jury deliberations and after a series of jury instructions relating to constructive possession which were given to the jury over the objections of defense counsel.

The petitioner was sentenced by the District Court (Canella, J.) to concurrent 18 month terms of imprisonment. The Court of Appeals affirmed the conviction. The petitioner is currently incarcerated.

A. The ATF Operation Against Savino

The ATF investigation began in March of 1985 based on highly suspect information provided by Blevins who had told ATF agents that Savino, a former police officer and New York City Councilman, who was legally licensed to carry a pistol in New York, intended to obtain silenced weapons allegedly "to go to war," with the IRS, or the U.S. Attorney's office, as a result of an income tax investigation of Savino (T73)[1] Blevins also told the ATF agents that Savino had previously requested firearms in coded conversations related to computer programs and printers.[2] Shortly after providing this information, Blevins became a paid informant for ATF and agreed to act as an undercover agent in an operation designed to induce Savino to take possession of illegal weapons and silencers from Blevins.

In early March 1985, Blevins met with ATF Agent Fontana in ATF's Los Angeles office. Agent Fontana developed a plan in which Blevins would initiate telephone calls to Savino, for the

---

1. Numbers in parentheses preceded by "T" refer to pages of the trial transcript.

2. The record at trial established that Savino had funded a computer business for Blevins and wanted either a return of his money, or certain computer programs and printers for his construction business in New York. These included quiet, or silent operating printers which could be used near his office conference room. Both Blevins and a female employee testified about the legitimate discussions with Blevins to obtain quiet printers (T56-57, 101-103, 245-255, 438-443).

purpose of inducing Savino to take possession of illegal firearms obtained by ATF (T79, 212-218).The ATF plan was to supply Savino with an illegal automatic machine gun and three pistols with silencers in an undercover operation involving Blevins.

On March 16, 1985, Blevins, pursuant to Agent Fontana's instructions attempted to introduce the topic of weapons in an alleged computer code to petitioner as follows:

> Blevins: I'm alright. I finally made contact with that guy that I was telling you about.
>
> Savino: Very good.
>
> Blevins: On the, uh, the . . .
>
> Savino: On the software.
>
> Blevins: The printers.
>
> Savino: On the what?
>
> Blevins: Well the software, right.
>
> Savino: Yeah.
>
> Blevins: The one big package and then the three small packages.

Ex. 11(B), p. 3.[3]

---

3. The designation "Ex." refers to transcripts of the tape recordings introduced as trial exhibits.

A review of the transcript reveals that regardless of Blevins' alleged attempt to impose a coded conversation referring to weapons, the discussion turned to the legitimate computer business between Blevins and Savino that had been the subject of prior computer dealings between them.

On March 18, 1985, under instructions from Agent Fontana to obtain a more specific reference to weapons, Blevins initiated an early morning telephone call to Savino. Blevins recorded the call (Ex. 12b). Savino, who was awakened by the telephone call, was set up by Blevins who told Savino that the printers "come in three sizes, twenty-two inch, a thirty-eight inch and a forty-five inch." Savino replied that Blevins should "go with the mid-size . . . there's not too much room on the desk." (Ex. 12B, pp. 1-2).[4] Once again the computer topic was initiated and led by Blevins with Savino merely responding to Blevins' vague inquiries.

The next recorded telephone call occurred on March 29, 1985. [Ex. 13(B)]. In this conversation, Savino pressed Blevins for the software for his office and asked Blevins why he kept "changing the nomenclature, printers from software to printers. I don't understand." [Ex. 13(B) at p. 2]. The following excerpt of that conversation is indicative of the confusion engendered as a result of Blevins' proceeding on the assumption that past communications about computers were encoded messages relating to firearms:

> Savino: . . . And I also thought that the software was coming in. In fact you even asked

---

4. Interestingly, while the government suggests that this is a code for the caliber of pistols that Savino allegedly is seeking, ATF used .22 caliber pistols as part of their attempted transfer not a .38 cal. (or the middle size) firearm.

me the last time I spoke to you, on how much of the software I might be able to sell in the future.

Blevins: Well okay, I, I, I'm getting lost. I am really honest to god getting lost . . .

Blevins: Joe, I really don't understand. I am getting lost.

On April 1, 1985, Blevins informed Savino that he would be coming to New York to meet with Savino to deliver the promised computer items [Ex. 15(b)]. At this point, ATF Agent Fontana obtained two .22 caliber pistols with silencers from ATF's Los Angeles office to use in the Savino investigation (T407). These weapons were not obtained at Blevins' request nor obtained by Blevins in California. Fontana kept these weapons in his exclusive possession and control during the entire time he was transporting them to New York. Savino never had any dealings with Agent Fontana (T410-415). At the same time, New York ATF Agent Pitta had requested that ATF in Washington D.C. provide him with a Mac 10 machine gun and a .22 caliber pistol with a silencer for use in the Savino investigation. These weapons remained in ATF's possession and control for the entire time they were transported from Washington D.C. to New York (T421-423).

Blevins and Agent Fontana arrived in New York on April 2, and met with Agent Pitta in ATF's New York offices. Blevins was shown the firearms for the first time *in New York*, where Savino resided (T308-09).

At approximately 10:00 p.m. on the night of the arrest, Savino advised Blevins that he wanted to meet in a local restaurant in the Bronx, because he was paranoid about the tax investigation [Ex. 17(b), pp. 3-4]. The transcript also reveals that Savino had been drinking heavily, stating that he was "not in good shape."

Blevins reproached him, telling Savino "don't get blotto on me." [Ex. 17(b), p. 5]. Savino suggested that he would leave the car trunk open so that Blevins could "throw the tapes in, in order to help Blevins get rid of the bulky package of computer things; before entering the restaurant." The following exchange then took place:

> Savino: We're not, I'm not doing anything wrong, am I?
>
> Blevins: No, no, there it's sensitive material. I wouldn't want these things captured by some of the opposition in, insofar as our, our uh, competition with respect to people in the same business.
>
> Savino: But what competition. We haven't made a . . . dime.

Ex. 17(B) at p. 6.

Savino also chastised Blevins for his cryptic references to the material he was bringing to the restaurant:

> Blevins: . . . I have this ,material but I have to, uh, take care of.
>
> Savino: When you say material I . . .
>
> Blevins: The programs.
>
> Savino: You you, people always get suspect when you talk about like you know, if it is a suitcase for Christ sake say a suitcase, but don't say material, or, uh, it's just like saying kilos.

Blevins: Well, I got the programs in a suitcase.

Ex. 17(b) at pp. 9-10.

After this telephone conversation, the ATF agents placed the four weapons into Blevins' suitcase and wired him with a tape recorder and transmitter (T308-310).

B. The Attempted Transfer of the Weapons to Savino

On the evening of April 3, 1985 after this succession of recorded telephone conversations, Blevins, wired with a body recorder and transmitter, met Savino in a Bronx restaurant. The express purpose of the meeting which was arranged by Blevins at the government's request, was to transfer possession of illegal weapons to Savino. The evidence at trial demonstrated that the proposed transfer of weapons never occurred, and that Savino's conviction should be reversed.

Blevins was then driven in an ATF undercover taxicab to meet Savino at the Bronx restaurant. When he first entered the restaurant he was met by the maitre d' who told Blevins that Savino's car trunk was open and that he could put the bag in Savino's trunk. Blevins, however, brought the bag of weapons into the restaurant and placed the bag on the floor on his left hand side. Savino was sitting on Blevins' right. For nearly an hour there was no discussion of guns and the bag remained untouched at Blevins' side (T316-322).

During the first hour the conversation mainly involved Savino's financial difficulties and the legal problems he was having in connection with the income tax investigation. Savino also indicated that he was paranoid about meeting with Blevins because he believed that perhaps the government would claim that he was in a tax conspiracy with Blevins [Ex. 18(B) at pp. 18-19]. Savino

also pressed Blevins about a computerized system for his office and expressed his concern that Blevins had just taken Savino's $25,000 without the intention to repay it. Blevins said that the computer things he brought were worth $6,000 which would reduce the debt to $19,000 (Ex. 18 at pp. 14-18, 20-21).

It is clear from the recorded conversation that Savino had been drinking heavily that night. It was also clear that Savino, who was fully licensed to carry a pistol, was legally carrying a pistol on the evening he met with Blevins. Toward the end of the evening, Savino engaged in a conversation with the bartender, who said he was also licensed to own a pistol. After emptying the bullets from his gun on the table Savino, who is also a former policeman, left the table where Blevins was sitting to show the interested bartender how to disarm a person holding a pistol. After a long animated demonstration punctuated with laughter, Savino returned to the table where Blevins was seated. Blevins took this opportunity to attempt to transfer illegal weapons to Savino. He initiated the following conversation:

> Blevins: . . . You know what's funny?
>
> Savino: Huh?
>
> Blevins: If you really want to impress these guys take that suitcase (or the stuff in that suitcase). That would impress them.

Exhibit 18(B), p. 53 (T346-349).

Acceding to Blevins' suggestion to impress the waiters, Savino, who had previously known Blevins to carry a nine millimeter semi-automatic weapon in such a suitcase, asked Blevins to open the suitcase and "bring out the big one and 'just make believe . . .' " [Ex. 18(B) at 54]. Blevins' testimony confirms that he

understood that he removed the guns from the bag to impress the waiters in the same light vein as Savino's previous demonstration with the bartender (T349-353).

Blevins then took the machine gun and one of the pistols from the bag [Ex. 18(B) p. 56; T355-56]. The transcript shows that Blevins first described these weapons to the waiters and that Savino parroted this description. Blevins' testimony makes it clear that only the machine gun and one of the firearms were taken from the bag, and that both of these weapons were removed from the bag by Blevins (T357). It is also clear that these firearms were displayed by Blevins to the waiters, that there is no evidence that Savino ever touched any of these weapons, and that Blevins retrieved the pistol and machine gun and then placed them back in his bag. Blevins at all times kept the satchel of weapons in his physical custody and under his control (T357-58).

After Blevins returned the weapons to his suitcase he transmitted a message to the ATF agents from the restroom indicating that Savino was armed, drunk, and dangerous and that he should be arrested immediately upon his exiting the restaurant. In fact, Savino was only "armed" with his legally licensed pistol, and the record is uncontroverted that Blevins had maintained control of the bag of weapons at all times [Ex. 18(B) at p. 58].

As Savino and Blevins were preparing to exit the restaurant Blevins finally tried to transfer the possession of the bag of weapons to Savino in accordance with ATF's plan. However, Savino clearly and unequivocally refused to take the bag of weapons despite Blevins repeated urgings. The following exchange took place:

> Blevins: I'll bring my bread [referring to bread purchased during the meal]: and you can bring your bag [referring to the bag of weapons].

Savino: My bag? I don't want to touch that f--king bag.

Blevins: Huh?

Savino: I don't wanna touch that f--ker.

Blevins: Well, then you bring the bread and I'll bring your bag I don't give a shit.

Savino: It's not my f--king bag.

Thus, in the only clear expression of intent relating to the possession of the firearms Savino categorically refused to take possession of those weapons. Blevins and Savino then left the restaurant with Blevins carrying the bag of weapons. As he reached Savino's automobile trunk which was unlocked, Blevins opened the trunk placed the bag of weapons in the trunk of Savino's car, despite Savino's protestations, and Blevins entered the passenger's side of Savino's automobile [Ex. 18(B) p. 65]. Savino was arrested within seconds of Blevins placing the bag of weapons in Savino's car.

C. Petitioner's Motions for a Judgment of Acquittal

At the close of the government's case and after the jury's verdict, the petitioner moved for a judgment of acquittal pursuant to Rule 29 of the Fed. R. Crim. P., arguing that the government's proof failed to establish that Savino took either constructive or actual possession of the weapons. The defense argued that the government's proof was insufficient to support a conviction relating to the possession of the firearms because (1) the government agent, Blevins, at all times, maintained custody and control over the satchel of weapons; (2) the government agent never consummated the transfer of the firearms to Savino, nor

did the government agent transfer to Savino the means for controlling the satchel of firearms; and (3) most importantly, at the time the government agent attempted to transfer the weapons to the petitioner, Savino categorically refused to take possession of the satchel of weapons and expressly denied any possessory interest in the weapons.

The government countered that constructive possession was established in the restaurant as a result of the alleged prior coded negotiations for the purchase of the weapons between Blevins and the petitioner, together with Blevins removing the weapons from the bag and displaying them to the waiters in the restaurant. The defense also moved for judgment of acquittal on the 18 U.S.C. § 922(a)(3) charges on the independent basis that the government failed to establish that Savino obtained any weapons from outside his home state of New York, thereby failing to prove an essential element of a criminal violation of § 922(a)(3). The defense also moved the court to include an alternate instruction on entrapment in the event that the jury were to decide that Savino took possession of the firearms. All three defense motions were denied.

D. The Court's Jury Instructions on Constructive Possession and the Jury's Verdict

Over defense objections, the court presented three examples of constructive possession which, when viewed as a whole, created manifest misunderstanding and confusion for the jury as to a key element of the case, thereby denying petitioner a fair trial under the Due Process Clause of the Fifth Amendment.

In its initial possession charge, the trial court gave the following example of constructive possession over defense objections (T566-567):

> I will give you an example of that so that I

think you will understand it a little better.

Suppose a woman goes to the A & P with her daughter. I think there was an A & P juror at one time in this case, but I guess she is not here anymore. But anyhow, she goes to the A & P. And lo and behold when she gets to the counter—she's got a great big basket of items—she finds out that she's lacking $20, she didn't bring enough money. So she says to her daughter, "Here is the key to the car. Go home and get $20. It's in the kitchen cabinet under a pile of plates."

The daughter takes the key and gets the car and rides over to the house; goes in the kitchen and opens up the kitchen cabinet, lifts up the plates and takes the $20, goes back to the store and gives it to her mother.

Let's follow that for a moment. When the mom gives the key to her daughter, the woman doesn't have actual physical possession of the $20; but she does have constructive possession of that money that's in the house, because she has the ability to exercise dominion and control over them, which she has done by giving it to her daughter.

As soon as the daughter gets the key, she has constructive possession of the $20, even though she is not in the house, because she is able to exercise dominion and control by getting in the car, riding to the house, going to the kitchen and taking the money.

She takes the money back to the A & P. At

> this point in time she has actual possession, the daughter has. The mother only has constructive possession, although she is the owner of the $20 bill. But when she the $20 bill, (sic) then she comes back and has actual possession.
>
> So the key element in the case is the exercise of dominion and control. If you can exercise dominion and control over something, then you are in constructive possession of it.

[T556-560].

This example is fatally flawed for at least the following reasons. First, entirely absent from the example is any reference to the fact that a necessary element of constructive possession is that the intent to take possession must exist at the same time that a person has the power to exercise dominion and control over an object. On the facts of this case the government undercover agent never relinquished the control of the weapons to the petitioner, nor did the agent consummate the transfer of the firearms to the petitioner, nor relinquish to the petitioner the means of controlling the satchel of firearms. The failure to include the necessary coexistence of the elements of intent and control in the example is highly prejudicial, especially where the "formal" charge relates to such an arcane and elastic legal fiction as constructive possession.

In addition, the use of a mother/daughter relationship to explain the exercise of dominion and control creates an inapposite relational context which is likely to engender confusion in a juror's mind and skew a proper understanding of the element of dominion and control in the context of this case, especially where the petitioner expressly declined to accept the actual transfer of the firearms.

The jury's confusion on the issue was apparent. On the third day of deliberation, the jury sent a note requesting an explanation of the law regarding possession, and requested another example of constructive possession (T578). Over defense objections, the judge proposed this second example:

> Now, the example. I take it you did not like the money under the plate, so we will get to a place where a man goes to an automobile agency, wants to rent a car. The car is in the lot alongside of the agency. While that car is in the lot alongside the agency, that agency has constructive possession of it, and they have actual possession because it is their property and under their control.
>
> A man comes in and rents the car. As soon as he pays the fee and what-not, and he gets into the car, he of course has actual possession. They say to an employee, "Show Mr. Jones where the car is, and they give the employee the keys to the car. It's only two feet away. It takes him two seconds to get there. During that two seconds time, he has constructive possession of the car, because he has the ability to exercise dominion and control over that car by simply putting in the key and driving off.
>
> Once he hands the key to the man who rented the car, he loses dominion, which is now in the hands of the man until he gets into the seat, and when he gets into the seat and puts the key in the ignition, he has actual possession.

(T581-582).

This second example compounds the confusion created by the first example: Again, the key elements of intent and control are omitted from the example; an employee/employer relation is used in the example creating an additional indicia of dominion and control, not found in an undercover agent/suspect relationship; and no part of the example addresses a fact pattern where a person is offered control but expressly declines to accept that offer. Moreover, the example does not result in constructive possession to the employee.

Six days after the court's initial charge, the jury requested a further explanation of "possess and receipt." The court gave the jury a third example:

> If a postman delivers a letter to a person and puts it in the mailbox because that person is not home, that person has received it, even though he is only in constructive possession of the letter. He actually hasn't touched it yet until he gets home, puts the key in the box and takes it out. I remind you, however, that to possess something, a person must have an intent to exercise dominion and control over it.

(T600-601).

This example of possession sheds no light on the issue of constructive possession in the context of this case, and, indeed omits the requirement that the petitioner must have an expressed intent to exercise control over the specific object in the mailbox before criminal liability can be imposed. After these three flawed and highly prejudicial instructions, the jury found the petitioner guilty.

E. The Decision on Appeal

On appeal to the Second Circuit which affirmed the judgment of conviction, the petitioner raised each of the issues which are contained in this petition for certiorari. The court, nevertheless, upheld the conviction for the reasons set forth in the brief memorandum decision which is appended hereto.

With respect to petitioner's claim that the evidence was insufficient to support constructive possession, the court held that the government's evidence supported the encoded interpretation that Savino told Blevins that the material in the suitcase would "reduce Blevins' debt to Savino," and "[m]oreover, Savino left instructions with the waiter at the restaurant that Blevins was to place the suitcase containing the weapons in Savino's trunk." The court does not address the indisputable fact that Savino expressly refused to take possession of the weapons in the restaurant after they were clearly identified as firearms, and that only after Savino rejected the attempted transfer of the firearms to him in the restaurant, did Blevins place the firearms in the unlocked trunk of Savino's car, over Savino's protests.

With respect to petitioner's claim that the government failed to prove the elements of 18 U.S.C. § 922(a)(3) which requires that the petitioner, himself, obtain weapons outside of his home state and then received those same weapons in his home state, the Second Circuit upheld the conviction on the basis that the government established sufficient evidence at trial "that Savino knew Blevins lived in California and that the two men had discussed the *possibility* of obtaining weapons in California. From this evidence, a reasonable jury could conclude that Savino knowingly received firearms obtained in California." (emphasis added) The Court of Appeals did not address at all the dispositive element of an offense and § 922(a)(3) which requires that the petitioner *himself* obtained the weapons from California—an

element entirely missing from the government's case.

With respect to the entrapment issue, the Court of Appeals upheld the trial court's refusal to charge the jury on entrapment on the grounds that some alleged negotiations with Blevins predated his involvement as a government undercover agent and therefore an entrapment charge was unnecessary. Absent from the Court of Appeals decision is any discussion of the "sting operation" launched and continued by the ATF agents who enlisted Blevins to act as an undercover agent and who engaged in a series of inducements and solicitations directed to Savino well after Blevins began acting as an undercover government agent.

The Court of Appeals did not discuss the trial court's instructions with respect to constructive possession.

REASONS FOR GRANTING THE WRIT

This case raises substantial issues of federal law which requires the attention and direction of this Court. The trial court, as affirmed by the Second Circuit Court of Appeals, has extended the legal fiction of constructive possession in the context of an undercover sting operation to a degree that is dangerous and unprecedented. Here, the petitioner without a prior criminal record, and former city councilman and police officer, was convicted of taking possession of illegal firearms as a result of a predetermined undercover operation designed to transfer illegal firearms to the petitioner.

Despite this undercover operation, the petitioner, at the moment the firearms were tendered to him by the undercover agent, clearly and categorically refused to take possession of the weapons and expressly disavowed any possessory interest in them. The government agent at all times maintained custody and control of the satchel of firearms, never made the transfer of the firearms

to Savino; nor did he transfer to Savino the means of controlling the firearms.

This conviction stands for the untenable and dangerous proposition that criminal culpability for illegal possession can be sustained based only on pretransfer negotiations, even if a petitioner does not take the final step of accepting the transfer of contraband from a government agent. It is important that this Court properly delimit the boundaries of the principles of constructive possession which can be used to support criminal liability, especially in cases involving controlled transfers by undercover government agents.

Likewise, the availability of an alternative defense of entrapment to the targets of government sting operations needs to be clarified by this Court. The recent proliferation of such operations against present and former public officials, and others, presents important questions about the availability of an alternative entrapment defense.

Finally, the criminal conviction of this petitioner, after flawed and prejudicial jury instructions regarding constructive possession is unjust and should be rectified. Likewise, the lower court's misapplication of criminal liability under 18 U.S.C. § 922(a)(3) should be corrected. We therefore request that certiorari be granted and ask the Court to decide the issues raised in this petition.

I.

The Constructive Possession Issues

The petitioner seeks reversal of his conviction on the grounds that it is based on improper interpretation of the federal law of constructive possession in criminal cases. It is submitted that a criminal conviction for possession of an illegal item cannot be

sustained where, as here, 1) the government agent at all times maintained custody and control of the firearms; 2) the government agent never made a transfer of the firearms to petitioner, nor did he transfer to petitioner the means of controlling of the firearms; and 3) at that time the government agent attempted to transfer the weapons to him, petitioner categorically refused to take possession of the weapons and expressly denied any possessory interest in the firearms.

No crime of illegal possession occurs as a result of negotiations no matter how extensive. Nor is possession established because of a discussion between a government agent and a petitioner about the alleged price of the illegal items. Unless and until the transaction is consummated so that the government agent either (i) transfers the illegal items to the petitioner, or (ii) transfers control over the illegal items to the petitioner there is no crime of possession.

In order to convict the petitioner on each count in the indictment, the government must establish beyond a reasonable doubt that the petitioner took either actual or constructive possession of the firearms.[5] *See United States v. Toner*, 728 F. 2d 115, 123-124, 128 (2d Cir. 1984); *accord United States v. Tribunella*, 749 F. 2d 104, 111-12 (2d Cir. 1984); *United States v. Batimana*, 623 F. 2d 1366, 1369 (9th Cir.), *cert. denied*, 449 U.S. 1038 (1980).

The government's theory with respect to possession in this case, as expressed to the jury during summation and on appeal, was that Savino took possession of the weapons in the restaurant

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5. Title 18 U.S.C. § 922(a)(3) requires that the petitioner must *receive* in his home state the subject firearm as an essential element of that crime. It has been held that receipt necessarily implies possession, *Ball v. United States*, 470 U.S. ____, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985)

notwithstanding his express refusal to take the weapons from Blevins. Neither petitioner's conduct in the restaurant, nor any alleged prior discussions with Blevins, are sufficient to establish that Savino took either actual or constructive possession of these weapons.

Actual possession is established when a person has "physical custody or actual personal dominion" of the object. *United States v. Batimana, supra* 623 F. 2d at 1369. Constructive possession has been broadly defined as existing when a person knowingly has the power and intent at a given time to exercise dominion and control over an object. *United States v. Tribunella*, (749 F. 2d 104, 111-112 2d. Cir. 1984). Neither actual nor constructive possession has been adequately proven in this case.

There is simply no evidence in the record sufficient to establish that Savino took possession of the firearms in the restaurant. The evidence shows that (i) Blevins obtained firearms from government agents in New York just prior to entering the restaurant; (ii) Blevins had actual possession and custody of the satchel of weapons as he entered the restaurant on the night of the arrest; (iii) during his conversation with Savino the weapons remained by Blevins' side and under his custody and control; (iv) Blevins suggested that the machine gun and one pistol be brought out in the restaurant to impress the waiters; (v) Blevins retrieved the machine gun and pistol and returned them to his suitcase, closed the suitcase and maintained actual custody and control of the suitcase; (vi) Blevins did not provide Savino with any measure of control over the satchel of weapons; (vii) Savino never made any attempt whatsoever to control or take custody of the satchel of weapons; and (viii) despite Blevins' urgings, Savino refused to take possession of the satchel of weapons as he was leaving the restaurant. In short, the weapons remained in the actual possession of Blevins at all times while Blevins and Savino were in the restaurant. Thus,

there is not a shred of evidence that Savino took actual possession of the weapons on the night of the arrest.

Nor can these facts support a finding of constructive possession. Constructive possession requires a "nexus or relationship between the petitioners and the goods that it is reasonable to treat the extent of the petitioners dominion and control as if it were actual possession." *United States v. Carneglia*, 468 F. 2d 1084, 1087 (2nd Cir. 1972), quoting *United States v. Casalinuovo*, 350 F. 2d 207, 209 (2nd Cir. 1965). *Cf.* Holmes, The Common Law, 216 (1881). Under the present circumstances, it cannot be said that a sufficient nexus or relationship existed between Savino and the weapons so that it would be reasonable to treat Savino as having actual possession. A review of applicable case law relating to constructive possession reveals no case in which a petitioner was held to be in constructive possession of an illegal object where a government agent either failed to make such transfer, or where the government agent did not relinquish control over the object and did not provide the petitioner with the means of controlling the object.[6]

Nor is constructive possession created as a result of prior negotiations, where, as here, the government agent maintains actual possession over the illegal object and the final and necessary step of a transfer of dominion and control over the object never occurred. Such circuustances would not even be sufficient to establish an attempted possession under federal statutes setting

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6. In *United States v. Toner*, 728 F. 2d 115, 124, (2d Cir. 1984) the court held that when property is initially in the hand of another, possession occurs and a crime of possession is complete when the property is transferred by the agent to the suspect. In *United States v. Damsky*, 740 F. 2d 134 (2nd Cir. 1984), the court found that constructive possession occurred when the undercover agent had relinquished control over a camper by giving the key to the defendant who knew that it contained contraband.

forth such a crime. *See United States v. Joyce*, 693 F. 2d 838 (8th Cir. 1982).

Thus, where the government agent is attempting to make a controlled transfer to the petitioner, the petitioner may not be found guilty of illegal possession until that transfer has been completed. As a matter of substantive federal criminal law, the government has not proved that the petitioner took possession of the firearms and therefore should not have been convicted.

Likewise, the jury instructions on constructive possession, did not accurately exemplify the principle of constructive possession, were confusing and prejudicial, thereby depriving the petitioner of a fair trial in violation of the due process clause of the fifth amendment. *See Cupp v. Naughton*, 414 U.S. 141, 146-49 (1973); *United States v. Scacchetti*, 668 F. 2d 643, 648 (2d Cir.), *cert. denied*, 457 U.S. 1132 (1982).

II.

The petitioner was entitled to the alternative entrapment defense requested by the defense.

During pretrial proceedings, defense counsel advised both the court and the government that it intended to assert entrapment as an alternative defense in accordance with the Second Circuit's decision in *United States v. Mayo*, 705 F. 2d 62, 71-72 (2d Cir. 1983) (T7). The defense also included an alternative entrapment defense in its opening remarks to the jury (T33-34). Both the government and the defense submitted proposed entrapment charges to the court. The District Court refused to submit the issue of entrapment to the jury, stating that even if the jury was not to believe a word of Blevins' testimony, an entrapment defense would not be appropriate since the case "originated with Blevins." (T464, 465, 474-475). Savino was clearly entitled to an entrapment

defense in this case. Through the cross-examination of Blevins and an analysis of the taped transcripts, Savino clearly raised sufficiently the issue of inducement, claiming:

> (i) In March and April of 1985, ATF agents devised a sting operation to induce Savino to take illegal weapons from Blevins.
>
> (ii) ATF provided the weapons for the deal.
>
> (iii) The weapons were not specifically mentioned in any taped conversation prior to the day of the arrest.
>
> (iv) Savino had no prior criminal record, and was in fact fully licensed to carry a pistol.
>
> (v) ATF set up the meeting in New York for the purpose of initiating the transfer of illegal weapons to Savino.
>
> (vi) Blevins, initiated the conversation about the illegal firearms in the restaurant; and attempted to get Savino to take possession.

The petitioner bears a slight burden to establish inducement as an element of entrapment:

> In this Second Circuit, soliciting, proposing, initiating, broaching or suggesting the commission of the offense charged "does constitute inducement." *Citing United States v. Sherman,* 200 F. 2d 880, 883 (2d Cir. 1952) (L. Hand, J.).

United States v. Dunn, 779 F. 2d 157 (2d Cir. 1985).

Dunn went on to hold that inducement refers to the governments' "initiation of the crime, and not the degree of pressure exerted" *quoting United States v. Riley,* 363 F. 2d 955, 958 (2d Cir. 1966). *Dunn, supra.*

Applying this standard to the present case makes it abundantly clear that the government's "sting" operation against Savino warranted the inclusion in this case of an alternative entrapment charge.

If the testimony of Blevins is discounted, it is clear that without a code being established, Blevins as a government agent, initiated all acts relating to the possession of firearms. Even if Blevins' testimony about a code was believed it was Blevins, acting as a government informant at the direction of ATF agents, who initiated the discussions leading to the alleged transfer of the firearms. (Exhibit 11B, p. 3) By asking Savino to proceed with a firearms deal Blevins, as a government agent, engaged in clear solicitation of a criminal offense, thereby satisfying any definition of inducement.

Savino's express refusal to take the weapons offered to him by Blevins in the restaurant is evidence of a lack of predisposition. This, together with the fact that Mr. Savino had no prior criminal record, was a former policeman and City Councilman, and was fully licensed to carry a pistol is a sufficient basis to submit the issue of predisposition to the jury. Under these circumstances, Savino should be entitled to an entrapment defense.

III.

The 18 U.S.C. § 922(a)(3) Issue

In order to establish criminal liability under Section 922(a)(3), the government must prove beyond a reasonable doubt that the

firearms were obtained by the petitioner outside of the state in which he resides. The testimony of Blevins, ATF agents Fontana and Pitta establish that Savino, himself never obtained firearms in California, and that Blevins had obtained the firearms from ATF agents in *New York* just prior to entering the restaurant on the night of the arrest.

At the close of the government's case, the petitioner moved pursuant to Rule 29 for a judgment of acquittal of counts 3 and 4 of the second superseding indictment, contending there was no evidence to support a finding that Savino personally obtained weapons from California. The court dismissed so much of the indictment that charged Mr. Savino with obtaining firearms in Washington, because there was no evidence to support that Savino knew that firearms would be obtained in Washington. The court, however, refused to dismiss the 922(a)(3) counts insofar as they related to the two firearms which were transported by ATF agent Fontana to New York from California, because Savino could have known that the firearms would be obtained in California (T428-437). The proof at trial, however, established without contradiction that the firearms were not in fact obtained by Blevins in California. Instead, Agent Fontana, with whom Savino had no dealings whatsoever, stated that he transported two pistols and a silencer from California on April 2 for use in his investigation against Savino in New York. These weapons were always under his custody and control, and Fontana specifically testified that he did not bring these weapons to New York at Blevins' request (T407, 411-415).

As a consequence, on the government's own evidence, no facts exist to support a conviction under 18 U.S.C. § 922(a)(3) which on its face requires that these firearms be obtained outside of New York *by the petitioner*. The fact that ATF Agent Fontana obtained two of the four weapons used in the operation from California is insufficient to establish that Savino "obtained" these

firearms in California. It appears that these firearms were obtained by ATF agents based on their availability at different ATF offices, as is evidenced by the fact that the machine gun and one of the pistols were obtained from ATF offices in Washington, D.C. Therefore, Savino's conviction for a violation of 18 U.S.C. § 922(a)(3) should be reversed under the clear language of the statute.

CONCLUSION

A writ of certiorari should issue to review the judgment of the Court of Appeals.

Dated: New York, New York
May 22, 1986

Respectfully submitted,

PAUL D. MONTCLARE
MONTCLARE & GUAY
Attorneys for petitioner

APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of March one thousand nine hundred and eighty-six.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE WILLIAM H. TIMBERS,
HONORABLE THOMAS J. MESKILL,
Circuit Judges.

86-1004

UNITED STATES OF AMERICA,

Appellee,

-against-

JOSEPH SAVINO, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix A

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby oredered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Savino claims the evidence at trial was insufficient to support a finding that he had actual or constructive possession of the weapons. The government, however, presented evidence that Savino told Blevins he would reduce Blevins's debt to Savino by an amount equal to the value of the weapons contained in the suitcase. Moreover, Savino left instructions with a waiter at the restaurant that Blevins was to place the suitcase containing the weapons in Savino's trunk. "Constructive possession exists when a person . . . knowingly has the power and the intention at a given time to exercise dominion an control over an object." *United States v. Pelusio,* 725 F.2d 161, 167 (2d Cir. 1983). Sufficient evidence was adduced at trial from which a reasonable jury could conclude Savino constructively possessed the weapons. *Jackson v. Virginia,* 443 U.S. 307, 317 (1979).

2. The appellant also claims the government failed to produce sufficient evidence at trial to support the jury's finding that Savino received firearms that were purchased or obtained outside the state. 18 U.S.C. § 922(a)(3). The government, however, proved at trial that Savino knew Blevins lived in California and that the two men had discussed the possibility of obtaining weapons in California. From this evidence, a reasonable jury could conclude that Savino knowingly received firearms obtained in California.

3. Finally, Savino contends the district judge erred by refusing

to charge the jury on entrapment. Judge Cannella, however, concluded that no reasonable jury could find that Savino was prompted by the government to purchase the weapons. Indeed, Blevins did not become a government agent until well after his negotiations with Savino had begun. The district judge, therefore, properly declined to charge the jury on entrapment.

4. We have carefully considered Savino's other claims, and find them to be equally without merit.

5. Accordingly, the judgment of the district court is affirmed.

s/ Irving R. Kaufman
IRVING R. KAUFMAN

s/ William H. Timbers
WILLIAM H. TIMBERS

s/ Thomas J. Meskill
THOMAS J. MESKILL

Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this Court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX B—RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment V.

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Title 26 U.S.C. § 5861(d).

> It shall be unlawful for any person . . .
>
> * * *
>
> (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record;

Title 18 U.S.C. § 922(a)(3).

> a. It shall be unlawful . . .
>
> * * *
>
> (3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive

Appendix B

in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a rifle or shotgun obtained in conformity with the provisions of subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;